IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1226

HENRY STADLER,

Petitioner,

vs.

CITY OF PHILADELPHIA,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari To the Supreme Court of New Jersey

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TABLE OF CONTENTS

Opinion Below 1

Counter-Statement of the Questions Presented for Review 1

Counter-Statement of the Case 2

REASONS FOR DENYING THE WRIT:

Petitioner was not denied procedural due process by being deprived of the right to notice and the opportunity to be heard 3

Conclusion 12

CASES CITED:

City of Philadelphia v. Kenny, 28 Cmwlth Ct. 531 369 A.2d 1343 (1977); allocator den; cert. den. 434 U.S. 923 reh. den. 434 U.S. 1025 ..... 5, 8

City of Philadelphia v. Sam Bobman Dept. Store Co., 189 Pa. Super. 72 149 A.2d 578 (1959) 8

City of Philadelphia v. Smith, 169 N.J. Super. 156, 404 A.2d 360 (1979) 4

DeGroot, Kalliel, Traint & Conklin, P.C. v. Camarota, 169 N.J. Super. 338, 404 A.2d 1211 (1979) 4

Griffin v. Griffin, 327 U.S. 220 (1946) 10

Housing Authority of City of Newark v. Sagner, 142 N.J. Super. 332, 361 A.2d 565 (1976) 4

Jersey City v. Division of Tax Appeals in State Dept. of Taxation and Finance, 5 N.J. Super. 375, 69 A.2d 331 (1949) 7

TABLE OF CONTENTS

CASES CITED:

Matter of Neuwirth Estate,
155 N.J. Super. 410, 382 A.2d 972 (1978) 3

N.Y. Susquehanna v. Vermeulen,
44 N.J. 491 (1965) 8

Passaic County Retail Liquor Dealer's Assn. v.
Board of Alcoholic Beverage Control,
37 N.J. Super. 187, 117 A.2d 147 (1955) 4

Pleasantville Taxpayers v. City of Pleasantville,
111 N.J. Super. 377, 268 A.2d 342 (1970),
aff'd 115 N.J. Super. 85, 278 A.2d 229 8

Wuchter v. Pizzutti,
276 U.S. 13 (1928) 7

CONSTITUTION CITED:

U.S. Constitution, Article IV, §1 2

STATUTES CITED:

N.J.S.A. 54:3-21 6

N.J.S.A. 54:3-22 7

ORDINANCE CITED:

Philadelphia Code, §1702(1) 5

RULE CITED:

Philadelphia Rule of Civil Procedure 306 ..... 9, 11

OPINION BELOW

Respondent accepts Petitioner's description of the opinions of the courts below.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Where provisions of the Philadelphia Code furnish an aggrieved taxpayer with an opportunity to be heard through an appeal to an administrative agency and then to a court of record from an adverse decision thereof and where said code provided that this is the exclusive procedure by which a challenge to a tax determination may be asserted, is Petitioner denied due process where, after notice of his rights to pursue this remedy, and failure to do so, he is denied an opportunity to raise in a subsequent action for collection of the tax, any defense which could have been raised before the agency?

2. Did a Philadelphia Rule of Civil Procedure, as constituted at the time Respondent commenced its cause of action against Petitioner violate Petitioner's right to procedural due process by requiring him to provide an address within the Commonwealth at which he could be served, where the record does not support any proposition that Petitioner attempted to file any document notwithstanding the foregoing rule or that Petitioner even knew of the existence thereof at that time.

COUNTER-STATEMENT OF THE CASE

Petitioner, a resident of New Jersey, is employed by the federal government on a federal enclave within the City of Philadelphia. Respondent assessed its wage tax against Petitioner after he failed to voluntarily self-assess the tax as required by law. Petitioner did not contest said assessment before the Tax Review Board. Respondent commenced an action in assumpsit against Petitioner in the Court of Common Pleas of Philadelphia. No Answer having been filed, Respondent obtained a default judgment against Petitioner.

Respondent then sought to enforce its judgment through the courts of New Jersey pursuant to the Full Faith and Credit Clause of the United States Constitution, Art. IV. §1. Respondent obtained a summary judgment in the Burlington County District Court. That decision was appealed to the New Jersey Superior Court, Appellate Division, which affirmed the lower court decision. The New Jersey Supreme Court denied Petitioner's Petition for Certification.

The constitutional issue that notice of a taxpayer's appeal rights, printed on the reverse side of the assessment notice, was not statutorily authorized and hence is invalid as notice was initially raised before the Burlington County District Court but then abandoned by Petitioner. See Petition Appendix "C".

The constitutional issue that Petitioner was denied procedural due process by being required to provide an address within the Commonwealth at which he could be served was properly raised and pursued in the courts below.

REASONS FOR DENYING THE WRIT

Petitioner was not denied procedural due process by being deprived of the right to notice and the opportunity to be heard.

1. The provisions of the Philadelphia Code which furnish an aggrieved taxpayer with an opportunity to be heard through an appeal to an administrative agency and then to a court of record from an adverse decision thereof, and which provide that this is the exclusive procedure by which a challenge to a tax determination may be asserted, do not deprive the Petitioner his right to due process where, after notice of his right to pursue this remedy and failure to do so, he is denied an opportunity to raise in a subsequent action for collection of the tax, any defense which could have been raised before the agency.

Petitioner's argument, when distilled to its essence, is that a taxpayer who has not yet subjected himself to *in personam* jurisdiction of a court, cannot be required to assert his defenses to the assessment before the Tax Review Board at the risk of being precluded from raising them in a judicial forum by the requirement that he exhaust his administrative remedies at the agency level. Further, he would argue there must be a legislative basis for service upon a taxpayer of the assessment and the absence of same falls short of the constitutional requisite for notice despite the receipt of actual notice of appeal rights on the reverse side of the assessment bill.

Full faith and credit must be accorded the judgment of a sister state as long as the judgment was obtained without fraud or as the result of want of jurisdiction over the subject matter or the parties. *Matter of Neuwirth Estate,* 155 N.J. Super. 410, 382 A.2d 972 (1978). The

litigation is conclusive of rights of the parties in every other court as in the court where judgment was entered, even if the judgment was obtained by default. *DeGroot, Kalliel, Traint & Conklin, P.C. v. Camarota,* 169 N.J. Super. 338, 404 A.2d 1211 (1979). See also *City of Philadelphia v. Smith,* 169 N.J. Super. 156, 404 A.2d 360 (1979).

This Court should not consider Petitioner's contention that he was denied notice and the opportunity to be heard in the courts of Pennsylvania, inasmuch as he abandoned that argument before the Burlington County District Court after initially raising it. See Footnote 2 of that court's opinion (which is found in Petition, Appendix "C"). Petitioner should be considered to have waived this contention due to his failure to pursue it. Under New Jersey law, a reviewing court would be limited to address the issues considered below and not what was outside the appeal record. *Passaic County Retail Liquor Dealer's Assn. v. Board of Alcoholic Beverages Control,* 137 N.J. Super. 187, 117 A.2d 147 (1955). Absent compelling reasons, appellate courts of that state decline to consider questions not properly presented at the trial level when the opportunity for such presentation was available. *Housing Authority of City of Newark v. Sagner,* 142 N.J. Super. 332, 361 A.2d 565 (1976).

Assuming *arguendo* that Petitioner did not waive the contention he now asserts, the issue as to the purported violation of his rights to due process must be addressed. In essence, the allegation of deprivation of such rights is that notice and the opportunity to be heard must accrue at a time not before *in personam* jurisdiction attaches to the taxpayer and that since he is required to set forth his defenses to a determination of tax delinquency by filing a petition for review with the Tax Review Board within sixty

days thereof, Philadelphia Code, §1702(1),[1] he is denied due process inasmuch as the doctrine of exhaustion of administrative remedies precludes the raising of defenses later before the court. A second issue he raises is that no statutory basis exists for notice by the mailing of assessment billings to taxpayers and that since the sending of such notice is "gratuitous" and "pursuant to the internal policy" of the Department of Revenue of the City of Philadelphia, such procedure is outside the mandate of legislative authority.

That the failure of a taxpayer to exhaust his administrative remedies before the Tax Review Board precludes his raising the defense of unconstitutionality of the tax as applied to him, was decided by the Commonwealth Court of Pennsylvania in *City of Philadelphia v. Kenny*, 28 Commonwealth Court, 531, 369 A.2d 1343 (1977), *allocatur denied; cert. denied*, 434 U.S. 923, *reh. denied*, 434 U.S. 1025. While that opinion did not address the issue of procedural due process, it clearly held that nonresident federal workers employed on federal enclaves within Philadelphia must contest the wage tax, if at all, by filing a petition for review with the Tax Review Board so as to provide for the development of a factual record at the agency level. The Board could then apply those facts to the defenses raised and, subject to judicial review, determine the legal issues raised.

Respondent concedes that if this Court determines that Petitioner was denied his constitutional rights to notice

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1. *Philadelphia Code, §19-1702. Petitions for Review.*

Every petition for review of any decision or determination relating to the liability of any person for any unpaid money or claim collectible by the Department of Collections including, but not limited to, any tax, water or sewer rent, license fee or other charge, and interest and penalties thereon, shall be filed with the Tax Review Board within 60 days after the mailing of a notice of such decision or determination to the petitioner.

and the opportunity to be heard regarding a challenge to the assessment, the doctrine of exhaustion of administrative remedies would not have precluded him from raising such an issue in the Court of Common Pleas of Philadelphia without first having appeared before the Tax Review Board. However, it will be demonstrated that the Philadelphia Tax Code's mechanism for contesting a tax determination does not violate petitioner's due process rights and so the courts of New Jersey properly accorded full faith and credit to the judgment obtained in Pennsylvania.

The State of New Jersey has enacted a similar procedural mechanism for the assessment and collection of taxes, the notice requirements of which have been determined to comport with due process rights.

N.J.S.A. 54:3-21,[2] provides that an aggrieved taxpayer who contests an assessment must appeal to the appropriate county board of taxation on or before August 15 of each

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2. New Jersey Statutes Annotated.

54:3-21. Appeals by taxpayers; by taxing district; petition

A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the country, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district or by the assessed valuation of property in another district in the county, may on or before August fifteenth appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the assessor, clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal. As amended L. 1945, c. 125, p. 479 §1.

year. *N.J.S.A.* 54:3-22 [3] sets forth the requirement that the board shall hear and determine said appeal. While there is no specific method of notice required in that tax code, notice by mail has been considered sufficient. *Jersey City v. Division of Tax Appeals in State Dept. of Taxation and Finance,* 5 N.J. Super. 375, 69 A.2d 331 (1949), *aff'd* 5 N.J. 433, 75 A.2d 865. In that case, the taxpayers argued that the absence of a notice provision denied due process. The court responded to this argument by conceding that if the giving of notice were a matter of grace or were left to the discretion of the city or tax board, this contention would probably be correct, citing *Wuchter v. Pizzutti,* 276 U.S. 13 (1928). However, inasmuch as the code does expressly mandate a hearing, it ruled that the requirement of notice is imported into the statute by judicial intendment.

Similarly, under the Philadelphia Code, no specific notice provision, much less anything approaching the requirement for service of process is to be found at the agency

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3. New Jersey Statutes Annotated.

54:3-22 Hearing of appeals; witnesses; evidence

The board shall thereupon make such order respecting the time and manner for hearing the appeal as it may deem just, and shall summarily hear and determine the appeal, and revise and correct the assessment in accordance with the value prescribed by law. All appeals filed pursuant to the provisions of chapter 3 of Title 54 of the Revised Statutes shall be heard and determined by the board. It may compel the attendance of witnesses, the production of books and papers before it, examine witnesses or cause witnesses to be examined under oath before it, which oath may be administered by a member of the board. In any proceeding before the board where deeds or other instruments of conveyance do not state the true consideration or sale price of the property, which is the subject of appeal, the United States documentary stamps attached, if any, to such deeds or instruments as well as recitals in such deed or in other instruments of record with respect to such property shall be admitted as *prima facie* evidence of the true consideration or sales price of the said property. As amended L. 1946, c. 161, p. 730 §17; L. 1960 c. 51, p—, §22.

level at which a taxpayer is given the opportunity to contest an assessment.

The New Jersey enactment has, like that in Philadelphia, see *City of Philadelphia v. Kenny, supra,* and *City of Philadelphia v. Sam Bobman Department Store Co.,* 189 Pa. Super. 72, 149 A.2d 578 (1959), been interpreted to require an appeal at the administrative level to be a condition precedent to the raising of meritorious defenses in a judicial forum. *Pleasantville Taxpayers v. City of Pleasantville,* 111 N.J. Super. 377, 268 A.2d 342 (1970), *aff'd* 115 N.J. Super. 85, 278 A.2d 229.

The New Jersey tax code, has been determined to pass constitutional muster pertaining to notice and the opportunity to be heard. It does not provide that a taxing authority possess *in personam* jurisdiction over a taxpayer at the time he is required to make his defenses to an assessment at the risk of precluding him from raising them in a judicial forum under the doctrine of exhaustion of administrative remedies. Further, like its counterpart in Philadelphia, the New Jersey statute has no specific notice provision, but rather notice is required as a matter of judicial intendment inasmuch as the code provides for a hearing upon the challenged assessment.

Petitioner also argues that full faith and credit may not be given in connection with the enforcement of foreign tax judgments "automatically entered". *N.Y. Susquehanna v. Vermeulen,* 44 N.J. 491 (1965).[4]

However, in that case, the procedure applicable to the enforcement of the Railroad Tax Law provided for the

4. The court held the requirements of due process were satisfied despite the *ex parte* entry of the judgment since the statute provided that its entry was without prejudice to the taxpayer's right of appeal.

State Comptroller to issue to the Clerk of the Superior Court a certificate specifying the amount of unpaid taxes, said certificate being then docketed as a judgment against the taxpayer.

Under the configuration of the Philadelphia Tax Code, no judgment is entered against a taxpayer as the result of an assessment. Nor may any judgment be docketed as the result of the failure to timely appeal to the Tax Review Board. As was done in the matter *sub judice,* upon the failure of taxpayer to pay the amount of taxes assessed or to contest the assessment before the Tax Review Board, the City of Philadelphia filed a Complaint in the Court of Common Pleas. After service thereof, Petitioner failed to answer the Complaint. Consequently, a default judgment was taken against him.

In view of the Petitioner's failure to file a petition for review before the Tax Review Board and his failure to file an Answer to Respondent's Complaint in the Court of Common Pleas, his cry of deprivation of the right to procedural due process must fall on deaf ears.

2. Philadelphia Rule of Civil Procedure 306, as constituted at the time Respondent commenced a cause of action against Petitioner did not violate Petitioner's right to procedural due process by requiring him to provide an address within the Commonwealth at which he could be served, inasmuch as the record does not support any proposition that Petitioner attempted to file any document, notwithstanding the foregoing rule or that Petitioner ever knew of its existence at that time.

Philadelphia Rule of Civil Procedure 306 then provided as follows:

> "The first paper filed by a party in a case shall have endorsed thereon an address in the Commonwealth

> at which all papers and notices thereafter may be served upon him, and the Prothonotary shall not accept filing unless it contains such endorsement."

Petitioner contends he was subjected to a violation of his right of procedural due process inasmuch as the above cited rule prohibited him from making a defense to an action brought against him in the Court of Common Pleas of Philadelphia for failure to pay his wage tax. Petitioner cites no precedent to buttress his contention of unconstitutionality. Other than postulating that "the denial of constitutional rights (is) patent and obvious", he merely refers to the general proposition, with which Respondent would agree, that a judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *Griffin v. Griffin*, 327 U.S. 220 (1946).

Petitioner would have this Court find that the rule in effect at the time he was served with the Complaint was unconstitutional, from the supposition that since the rule was later amended to allow the use of an address outside the Commonwealth for nonresident defendants appearing *pro se*, the rule prior to amendment must have been violative of his constitutional rights.

This assertion, unsupported by any precedent which bears directly or analogously on the constitutional issue he raises, represents the proverbial grasping at straws to which so many nonresident federal employees in Philadelphia have so often turned in their attempt to avoid payment of the City wage tax.

Petitioner raised this issue before the District Court in New Jersey, through which Respondent sought to enforce its Pennsylvania judgment. In its opinion, the court ex-

pressed disagreement with the contention that Petitioner was prevented from appearing in court in Philadelphia, a position which Respondent wholeheartedly adopts:

> "It (Rule 306) does not exclude a nonresident litigant from making his appearance. In these matters defendants could have provided a mailing address within the city since they worked on installations clearly within its boundaries. No authority has been presented to this court which holds that the Pennsylvania courts deny access to the court for failure to comply with the above cited rule. Nor did defendants make any effort whatsoever to appear. Therefore, no shred of evidence supports the theory that this rule is violative of the Fourteenth Amendment."

Furthermore, the record is devoid of any evidence supporting the proposition that Petitioner attempted to file a document with the court and was precluded from so doing by the application of *Rule* 306. Nor is there to be found in the record an indication that Petitioner was even aware of the existence of such a rule. After service of the Complaint, the twenty day period permitted for answering lapsed without any effort on Petitioner's behalf to respond. The assertion of a denial of due process on the basis of a rule which went untested by Petitioner cannot rise to a valid attack on its constitutionality.

Consequently, inasmuch as Petitioner has provided no basis upon which to support his contention that the rule violated his right to due process, his Petition for Writ of Certiorari should be denied.

CONCLUSION

It is respectfully submitted that for the reasons set forth in this brief, this Honorable Court should not grant Petitioner's request for review of the decisions of the Courts of New Jersey.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of New Jersey filed by Petitioner herein be denied.

Respectfully submitted,
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see 80

1229